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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

EDGAR NEGRETE,

Defendant and Appellant.

H033537

(Santa Clara County

Super. Ct. No. EE806640)

Defendant appeals from the sentence imposed following his plea of nolo contendere to one count of unlawful sexual intercourse with a minor more than three years younger than himself, infliction of corporal injury with a prior conviction for the same conduct within seven years, and transportation of methamphetamine. (Pen. Code, §§ 261.5, subd. (c), 273.5, subd. (e)(2); Health & Saf. Code, § 11379.)<sup>1</sup> At the plea hearing, the parties submitted to the court for decision the question whether defendant must register as a lifetime sex offender pursuant to section 290. At sentencing, the court exercised its discretion to impose a lifetime sex offender registration requirement on defendant pursuant to section 290.006.

On appeal, defendant argues that the trial court abused its discretion by imposing the lifetime registration requirement on him. He also argues the imposition of discretionary sex offender registration on him based upon judicial rather than jury

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<sup>1</sup> Unless otherwise indicated all further statutory references are to the Penal Code.

factfinding violates his Sixth Amendment right to a jury trial under *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*) and constitutes cruel and unusual punishment. We affirm.

## **STATEMENT OF FACTS<sup>2</sup>**

Sixteen-year old J. had been dating defendant for six months and had been having consensual sexual intercourse with him when she moved into defendant's mother's house and later stayed with him in hotels or at friends' homes. On July 20, 2008, defendant offered her methamphetamine while they were at the home of a friend. She reported that she was afraid that defendant and his friend would hurt her if she refused the drugs. The next day, defendant and J. moved to a hotel, slept and had consensual sex. Later, they argued, she cried, and defendant grabbed her, bit her cheek, pushed her face down onto the bed and told her to "shut up" or it would get worse. Defendant also hit her on the back of the head. Shortly thereafter, they left the hotel. Once outside, J. ran away from defendant and called for help. She told police that defendant had hit her numerous times, and that she had tried to leave him, but defendant used force and fear to keep her with him at all times.

Defendant, age 21, was arrested on July 21, 2008, by Sunnyvale police. He admitted to the police that he knew J. was 16 years old, and that they had been having sexual intercourse, but she was supposed to be a legal adult: her mother had " 'given' " J. to him. He admitted that he bit her on the cheek. Defendant tested positive for methamphetamine consumption. Police noted that J. had an injury below her left eye and a bruise on her leg.

According to a police report prepared by the Sunnyvale Police Department, on June 11, 2006, defendant then 19 years old, picked up his 16-year-old girlfriend and her

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<sup>2</sup> Inasmuch as defendant waived a preliminary hearing, the factual summary of the offenses to which defendant pleaded no contest is derived from the probation report.

brother after work and drove them around for “ ‘a couple hours’ ” before taking them to his house, where they all spent the night. Defendant’s mother, father, brother, sister, and nephew were at home. Defendant and the girl engaged in sexual intercourse in his bed in the room he shared with his sister, who was sleeping. In the morning, defendant went to work and the girl stayed at his house, at defendant’s request. She preferred to stay at his house with his mother because she knew her parents would be mad at her for spending the night at defendant’s house. Shortly after defendant returned from work in the afternoon, the police arrived, looking for the girl and her brother. The girl’s parents had reported her and her brother missing. The police removed her from defendant’s residence.

The girl reported she was two months pregnant with defendant’s child. She said that she and defendant had been dating since November 2005 and had been having sex since April 2006. They had had sexual intercourse more than 20 times. Police determined from the girl’s statements that the allegations of rape, kidnapping and terrorist threats reported by the Atherton Police Department were unfounded. However, the Sunnyvale police also determined that on May 20, 2006, defendant had been arrested in San Mateo County for a domestic violence incident involving his girlfriend. She told the police that “due to Negrete’s past violent behavior she was concerned for her safety. [She] was concerned that Negrete would become violent when he learned” of the unlawful sexual intercourse charge. She requested a protective order to restrict Negrete from having contact with her.

Defendant was convicted of domestic battery, a misdemeanor violation of section 243, subdivision (e)(1) in Redwood City for which imposition of sentence was suspended and he was placed on 36 months’ probation on the condition, among others, that he serve 10 days in county jail. He was convicted of an unlawful sexual intercourse with a minor, a misdemeanor violation of section 261.5, subdivision (b), on December 14, 2006.

On September 22, 2008, defendant entered pleas of no contest to felony violations of section 261.5, subdivision (c), 273.5, subdivision (e)(2), and Health & Safety Code section 11379, with the understanding that he would be sentenced to state prison for three years, and with the further understanding that the Court would leave open, until it read the police report in the 2006 unlawful sexual intercourse case, the question whether it would impose sex offender registration pursuant to section 290. On October 27, 2008, the court sentenced defendant to concurrent three-year terms in state prison, as promised. After hearing argument from both attorneys, and over defendant's objection, the court also imposed sex offender registration on defendant.

## **DISCUSSION**

Defendant pleaded no contest to a violation of section 261.5, subdivision (c), which proscribes sexual intercourse with a minor who is more than three years younger than the perpetrator. Section 290 does not require mandatory registration for persons convicted of unlawful sexual intercourse with a minor. However, section 290.006 gives the trial court discretion to decide whether to impose lifetime sex offender registration on a person convicted of that offense. Section 290.006 provides: "Any person ordered by any court to register pursuant to the Act for any offense not included specifically in subdivision (c) of Section 290, shall so register, if the court finds at the time of conviction or sentencing that the person committed the offense as a result of sexual compulsion or for purposes of sexual gratification. The court shall state on the record the reasons for its findings and the reasons for requiring registration."<sup>3</sup> "[T]o implement the requirements

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<sup>3</sup> The trial court stated in relevant part: "I certainly have considered the police report in [the 2006] case, which indicates to me that Mr. Negrete, while, of course, younger than he is now, and closer, of course, to the age of 18 . . . still was in my mind taking advantage and sexual advantage of a girl who was not an adult, who was in her teen-age years, just as the girl in this particular case, the felony case before the Court, being 16, and now Mr. Negrete finds himself to be considerably older than he was in 2006. [¶] I have to say that in reviewing the report in that Palo Alto case in which

of section [290.006], the trial court must engage in a two-step process: (1) it must find whether the offense was committed as a result of sexual compulsion or for purposes of sexual gratification, and state the reasons for these findings; and (2) it must state the reasons for requiring lifetime registration as a sex offender. By requiring a separate statement of reasons for requiring registration even if the trial court finds the offense was committed as a result of sexual compulsion or for purposes of sexual gratification, the statute gives the trial court discretion to weigh the reasons for and against registration in each particular case.” (*People v. Hofsheier* (2006) 37 Cal.4th 1185, 1197.)

### ***No Abuse of Discretion***

Comparing the facts of his case with those in *Lewis v. Superior Court* (2008) 169 Cal.App.4th 70 (*Lewis*), defendant argues that the trial court’s imposition of sex offender

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apparently also he got this girl pregnant. She was two months pregnant with Negrete’s child at the time, that there are certain aspects of the case that are troubling. [¶] And also some of the aspects of the case I found troubling was that Mr. Negrete was driving this girl for several hours in her car. The girl tells police that nothing of any particular violence happened while they were driving around Sunnyvale for a couple of hours, but when the police officer tried to press the young girl to further elaborate what she meant by this, she refused to talk about it further with the police officer. [¶] There are other aspects of the case which, if one closely reads between the lines, should give a reasonable reader some apprehension at the very least as to Mr. Negrete mentally, if not physically, coercing [the] victim in that particular case as well. In this particular case there’s no question, and I’m talking about the felony case right now, that he used coercion, both physical and mental, upon this 16-year-old victim. [¶] And, quite frankly, he’s a danger, I think, to girls in this community. . . . I’m talking about young teen-age girls that are much more susceptible to being taken advantage of, especially if they’re not coming from the best of families or being monitored closely by parents. [¶] That’s what I found in both these situations. They were very susceptible, and seems to me Mr. Negrete took advantage of that in both these situations. Quite frankly, I’m worried about it happening again once he’s out of custody, quite frankly, and I do think registration is very appropriate in this case. I wish it had been ordered in the other case. Perhaps maybe things would have been different in . . . July of 2008 when he committed this offense upon the second teenage girl. [¶] So do I believe it’s appropriate? Do I believe the probation recommendation is called for? Yes, I do. So the Court will excise its discretion and order registration.”

registration on him under section 290.006 constituted an abuse of discretion. In *Lewis*, defendant was convicted of oral copulation with a minor under the age of 18 in 1986. Construing as a writ of mandate defendant's appeal from the denial of a postjudgment motion to set aside the order requiring him to register as sex offender under section 290, this court granted defendant *Hofsheier* relief from mandatory registration on equal protection grounds, and further found no basis in the record to support discretionary imposition of sex offender registration on Lewis. This court noted that that, at age 17, the victim was "not so young as to suggest that [the defendant], who was 22, had been compelled to act on account of her youth." (*Id.* at p. 79.) Moreover, defendant's acquittal on forcible oral copulation charges meant "there was no substantial evidence that Lewis had used force or fear upon the victim, that he had threatened her, or that the victim's age and relationship to Lewis was such that she was coerced into doing something she would not otherwise have done." (*Ibid.*) The court also noted that "in the 20 plus years since his conviction . . . Lewis has committed no offenses requiring him to register as a sex offender and no offenses similar to those requiring registration." (*Ibid.*)

The *Lewis* court reasoned that "[s]ince the purpose of sex offender registration is to keep track of persons likely to reoffend, one of the 'reasons for requiring registration' under section 290.006 must be that the defendant is likely to commit similar offenses – offenses like those listed in section 290 – in the future. [Citation.] [¶] The registerable crimes listed in section 290, subdivision (c) may be characterized generally as sexual offenses committed by means of force or violence, violent offenses committed for sexual purposes, sexual offenses committed against minors, or offenses that involve the sexual exploitation of minors." The *Lewis* court found nothing in the record before it to support the conclusion that Lewis was likely to commit such crimes. (*Lewis, supra*, 169 Cal.App.4th at pp. 78-79.)

*Lewis* is distinguishable from this case. Here, within three years, defendant became involved in long-term sexual relationships with two different 16-year-old girls.

Although defendant was getting older, the girls he became involved with sexually were not, suggesting that defendant might have a sexual compulsion toward 16 year olds. Furthermore, both relationships involved elements of mental coercion, and in both cases the girls were the victims of domestic violence at defendant's hands. As such, both offenses evidenced elements that made them similar to the categories of offenses identified by *Lewis* as those subject to registration. The trial court's stated reasons pinpointed the elements of compulsion and coercion in defendant's offenses as "troubling." Under the circumstances, we cannot say the trial court abused its discretion in imposing sex offender registration on defendant.

### ***No Apprendi Error***

On November 7, 2006, voters approved Proposition 83, The Sexual Predator Punishment and Control Act (SPPCA) commonly known as Jessica's Law. The law went into effect on November 8, 2006. (Cal. Const., art. II, § 10(a).) The SPPCA added subdivision (b) to Penal Code section 3003.5. That statute states: "Notwithstanding any other provision of law, it is unlawful for any person for whom registration is required pursuant to Section 290 to reside within 2000 feet of any public or private school, or park where children regularly gather." (§ 3003.5, subd. (b) (hereafter § 3003.5(b)).)

Defendant argues that section 3003.5(b)'s new residency restriction constitutes punishment, or it converts sex offender registration into punishment and, since sex offender registration is not mandatory in his case, the residency restriction "increases penalty for a crime beyond the prescribed statutory maximum." (*Apprendi, supra*, 530 U.S. at p. 490.) For this reason, defendant contends, the facts underlying his registration must be found by a jury and proved beyond a reasonable doubt. (*Blakely v. Washington* (2004) 542 U.S. 296.) He argues that since the facts supporting sex offender registration in his case were found by the judge, his Sixth Amendment rights were violated.

*Apprendi* only applies if the *consequences* of sex offender registration constitute punishment for an offense. (See *Apprendi*, *supra*, 530 U.S. at p. 490.) It is well established that sex offender registration, in and of itself, “serves an important and proper remedial purpose” and is not “so punitive in fact that it must be regarded as punishment.” (*People v. Castellanos* (1999) 21 Cal.4th 785, 796 [sex offender registration was not punishment for purposes of ex post facto analysis]; *In re Alva* (2004) 33 Cal.4th 254 [life-long sex offender registration not punishment for purposes of prohibition against cruel and unusual punishment]; see also *People v. Hofsheier*, *supra*, 37 Cal.4th at p. 1197.) Furthermore, it has been held that the public inspection and public notification provisions imposed as a consequence of sex offender registration do not constitute punishment for *Apprendi* purposes. (*People v. Presley* (2007) 156 Cal.App.4th 1027, 1032-1033; see also *People v. Garcia* (2008) 161 Cal.App.4th 475, 486, disapproved on other grounds in *People v. Picklesimer* (2010) 48 Cal.4th 330, 338, fn. 4 [no entitlement to jury trial on registration requirements]; *Smith v. Doe* (2003) 538 U.S. 84, 99 [public notification provisions of Alaska’s sex offender registration law did not render that law punishment for ex post facto purposes].) None of these cases addresses the precise question presented here.<sup>4</sup>

In *People v. Picklesimer*, *supra*, 48 Cal.4th 330, our Supreme Court addressed but did not resolve the question whether the residency restriction imposed on registered sex offenders by section 3003.5(b) transformed sex offender registration into punishment for *Apprendi* purposes. The court concluded that defendant Picklesimer could not show a

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<sup>4</sup> During the pendency of defendant’s appeal, our Supreme Court granted review in *People v. Mosley*, formerly at 168 Cal.App.4th 512 (rev. granted 3/18/09, S169411) which had resolved the *Apprendi* issue raised here in defendant’s favor. The court ordered briefing deferred pending decision in *In re E.J.* (S0156933). *In re E.J.* was decided on February 1, 2010, and is discussed later in this opinion. On April 28, 2010, the court transferred *Mosley* to the Court of Appeal, Fourth Appellate District, Division Three, with directions to vacate its decision and to reconsider the cause in light of *In re E.J.* (2010) 47 Cal.4th 1258. (Cal. Rules of Court, rule 8.528(d).)

potential *Apprendi* violation because “if Proposition 83’s restrictions do not amount to punishment for his original crimes there is no *Apprendi* problem and no right to a jury trial. Conversely, if Proposition 83’s restrictions were to be considered punishment for his original offenses (but see *In re E.J.*[, *supra*,] 47 Cal.4th [at pp.] 1271-1280. . .), they could not under the state and federal ex post facto clauses be constitutionally applied to Picklesimer, whose crimes all long predate the approval of Proposition 83. [Citations.] In either event, there is no constitutional bar to having a judge exercise his or her discretion to determine whether Picklesimer should continue to be subject to registration.” (*Id.* at p. 344.)

In *In re E.J.*, four registered sex offender parolees challenged by way of unified habeas corpus petition the residency restriction contained in section 3003.5(b) on various constitutional and non-constitutional grounds, including that application of the law to them violated the rule against retroactive application of a new law and the ban against ex post facto laws. In each case, the parolee-petitioner had been released from custody on parole after the effective date of the new law. (*In re E.J.*, *supra*, 47 Cal.4th at pp. 1263-1264.) Our Supreme Court decided that section 3003.5(b) operated prospectively because it applied only to sex offenders subject to lifetime registration who were paroled and who secured noncompliant housing after the statute’s effective date. (*Id.* at p. 1273.) Put differently, “[f]or purposes of retroactivity analysis, the pivotal ‘last act or event’ [citation] that must occur before the mandatory residency restrictions come into play is the registered sex offender’s securing of a residence upon his release from custody on parole. If that ‘last act or event’ occurred subsequent to the effective date of section 3003.5(b), a conclusion that it was a violation of the registrant’s parole does not constitute a ‘retroactive’ application of the statute.” (*Id.* at p. 1274.) Since the statute was not being applied retroactively to petitioners, section 3003.5(b) also did not run afoul of the ban against ex post facto laws. (*Id.* at p. 1279.) “[T]he new residency restrictions apply to events occurring *after* their effective date-petitioners’ acts of taking up residency

in noncompliant housing upon their release from custody on parole after the statute's effective date. It follows that section 3003.5(b) is not an ex post facto law if applied to such conduct occurring after its effective date because *it does not additionally punish for the sex offense conviction or convictions that originally gave rise to the parolee's status as a lifetime registrant under section 290.*" (*Id.* at p. 1280, italics added.)

Our Supreme Court's method of resolving the ex post facto claim in *In re E.J.* did not require it to decide whether the residency restriction constitutes punishment per se. On the other hand, *Picklesimer's* reference to *In re E.J.* suggests that, for the purposes of the Court's ex post facto analysis, it assumed that the residency restriction constitutes punishment, but not punishment for the offenses that gave rise to the parolees' status as a lifetime registrants under section 290, which in all four cases before it occurred well before section 3003.5(b) became law.

In this case, if the residency restriction is punishment, ex post facto principles would not bar application of section 3003.5(b) to defendant here, whose conviction which gave rise to the lifetime sex offender registration postdates the approval of Proposition 83. However, we read *In re E.J.* as instructing that even if section 3003.5(b) imposes punishment, it does not impose punishment for the offense that gives rise to sex offender registration. Rather, if it punishes, it punishes for conduct that occurs after the commission of, or the conviction for, the registerable offense. In other words, sex offender registration, in and of itself, is concededly not punitive, and the punitive effect, if any, of section 3003.5(b) is not specific to the offense of which the defendant was convicted. Therefore, *Apprendi* does not confer a right to jury trial on facts which are the predicate for the trial court's exercise of discretion in imposing sex offender registration. As the United States Supreme Court recently observed: "States currently permit judges to make a variety of sentencing determinations other than the length of incarceration. Trial judges often find facts about the nature of the offense or the character of the defendant in determining, for example, the length of supervised release following service

of a prison sentence; required attendance at drug rehabilitation programs or terms of community service; and the imposition of statutorily prescribed fines and orders of restitution. . . . Intruding *Apprendi*'s rule into these decisions on sentencing choices or accoutrements surely would cut the rule loose from its moorings.” (*Oregon v. Ice* (2009) \_\_\_ U.S. \_\_\_ [129 S. Ct. 711, 719].) We agree with the Attorney General that discretionary sex offender registration and residence restrictions, like the consecutive and concurrent sentences in *Ice*, “are the kind of ‘sentencing choices or accoutrements’ that . . . have been traditionally decided by courts in their authority of the administration of criminal justice.” To paraphrase *In re E.J.*, there is no constitutional bar to having a judge exercise his or her discretion to determine whether defendant should be subject to registration. We perceive no *Apprendi* error.

### ***No Cruel and/or Unusual Punishment***

Finally, defendant argues that section 3003.5(b)'s the residency restriction constitutes cruel and/or unusual punishment under the Eighth Amendment to the federal constitution and article 1, section 17 of the California constitution. A punishment is excessive if it involves “the unnecessary and wanton infliction of pain” or if it is “grossly out of proportion to the severity of the crime.” (*Gregg v. Georgia* (1976) 428 U.S. 153, 173.) A punishment may violate article 1, section 17 of the California Constitution if “it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity.” (*In re Lynch* (1972) 8 Cal.3d 410, 424.) In determining whether the punishment imposed for an offense is cruel and/or unusual, courts examine the nature of the particular offense and offender, the penalty imposed in the same jurisdiction for other offenses, and the punishment imposed in other jurisdiction for the same offense. (*Solem v. Helm* (1983) 463 U.S. 277, 290-291; *In re Lynch, supra*, 8 Cal.3d at pp. 435-437.) In *In re Alva, supra*, 33 Cal.4th 254, our Supreme Court determined that lifelong sex offender registration, imposed on persons

convicted of certain misdemeanor offenses, did not constitute punishment and therefore did not violate the ban against cruel and/or unusual punishment, overruling *In re Reed* (1983) 33 Cal.3d 914. Implicit in these cases is the notion that the punishment of which the defendant complains is punishment for the offense of which defendant was convicted. For the reasons we have explained above, even if we view the residency requirement as punishment for the purposes of defendant's argument, *In re E.J.* teaches that it is punishment for conduct that occurs after conviction; it is not punishment for the offense of which defendant was convicted. Therefore, we reject defendant's challenge to the residency requirement on cruel and/or unusual punishment grounds.

### ***No Penal Code section 4019 Credits***

In a supplemental opening brief, defendant argues that if the registration requirement is reversed, then he is entitled to "one for one" presentence conducted credits pursuant to the amended provisions of section 4019.<sup>5</sup> Effective January 25, 2010,

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<sup>5</sup> Section 4019 provides, in relevant part: "(a) The provisions of this section shall apply in all of the following cases: [¶] (1) When a prisoner is confined in or committed to a county jail, industrial farm, or road camp, or any city jail, industrial farm, or road camp, including all days of custody from the date of arrest to the date on which the serving of the sentence commences, under a judgment of imprisonment, or a fine and imprisonment until the fine is paid in a criminal action or proceeding. [¶] . . . [¶] (b)(1) Except as provided in Section 2933.1 and paragraph (2), subject to the provisions of subdivision (d), for each four-day period in which a prisoner is confined in or committed to a facility as specified in this section, one day shall be deducted from his or her period of confinement unless it appears by the record that the prisoner has refused to satisfactorily perform labor as assigned by the sheriff, chief of police, or superintendent of an industrial farm or road camp. [¶] (b)(2) If the prisoner is required to register as a sex offender pursuant to Chapter 5.5 (commencing with Section 290) . . . for each six-day period in which the prisoner is confined in or committed to a facility as specified in this section, one day shall be deducted from his or her period of confinement unless it appears by the record that the prisoner has refused to satisfactorily perform labor as assigned by the sheriff, chief of police, or superintendent of an industrial farm or road camp. [¶] . . . [¶] (c)(2) If the prisoner is required to register as a sex offender pursuant to Chapter 5.5 (commencing with Section 290) . . . for each six-day period in which the prisoner is confined in or committed to a facility as specified in this section, one day shall

amended section 4019 increases conduct credit for time served to one day for every four days served. However, as defendant recognizes, these ameliorative provisions do not apply to a prisoner who is “required to register as a sex offender pursuant to Chapter 5.5 (commencing with Section 290).” (§ 4019, subds. (b)(2) & (c)(2).) Inasmuch as we affirm the imposition of the registration requirement as a proper exercise of discretion, defendant is such a prisoner. Therefore, by the terms of section 4019, he is not entitled to any additional credits.

### **DISPOSITION**

The judgment and sentence are affirmed.

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McAdams, J.

WE CONCUR:

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Bamattre-Manoukian, Acting P.J.

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Mihara, J.

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be deducted from his or her period of confinement unless it appears by the record that the prisoner has not satisfactorily complied with the reasonable rules and regulations established by the sheriff, chief of police, or superintendent of an industrial farm or road camp.” (Amended by Stats. 2009-2010, 3rd Ex.Sess., c. 28, § 50, eff. Jan. 25, 2010.)